

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:) 1998 OAL Determination No. 21
)
Request for Regulatory) [Docket No. 91-021]
Determination filed by MARK)
GLASS regarding the) September 22, 1998
DEPARTMENT OF)
CORRECTIONS, PELICAN BAY) Determination Pursuant to
STATE PRISON rules) Government Code Section
governing inmates housed in) 11340.5; Title 1, California
the violence control unit ¹) Code of Regulations,
_____) Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
TAMARA J. PIERSON, Administrative Law Judge on
Special Assignment
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law ("OAL") was requested to determine whether rules, which allegedly governed the inmates housed in the violence control unit in Pelican Bay State Prison, were "regulations" and therefore were without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that these rules were not "regulations" because they did not apply to inmates statewide; thus, they did not need to be adopted pursuant to the APA.

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ISSUE

The issue presented to the Office of Administrative Law ("OAL") is whether the rules that govern inmates housed in the violence control unit of Pelican Bay State Prison are "regulations" required to be adopted pursuant to the APA.²

ANALYSIS

Mark Anthony Glass was an inmate at Pelican Bay State Prison ("PBSP"). On May 27, 1991, he was placed in the violence control unit ("VCU") for failing to comply with the rules of the security housing unit ("SHU"). He was told if he complied with the rules in the VCU he would be allowed to reenter the SHU. When he requested a copy of the VCU rules, he was told that the rules were not reviewable for security reasons.

He filed a request with OAL³ to determine whether the rules governing inmates in the VCU at PBSP were "regulations" required to be adopted in compliance with the APA. No copy of the VCU rules was attached to his request for determination. However, he set forth a number of rules that he knew, personally or from other inmates, to be enforced in the VCU.⁴ He argued that these rules were regulatory in nature, but had not been adopted in compliance with the APA.

In its response, the Department contends the issue is moot because the VCU has been out of existence for the last five years. OAL has consistently concluded, however, that subsequent laws or actions by the Department do not change the obligation of OAL under its own statutes and regulations to issue a determination based upon the law and the facts at the time the request was filed.⁵

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and

regulations *shall be promulgated and filed pursuant to [the APA]. . . .*
[Emphasis added.]”

Clearly, the APA generally applies to the Department's quasi-legislative enactments.⁶ After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements. [See section 5058, subdivisions (c) and (d)]. The applicability of one of these exemptions will be discussed below.

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision of Government Code section 11342, subdivision (g), defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]”

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

In *Grier v. Kizer*,⁷ the California Court of Appeal upheld OAL's two-part test⁸ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"⁹

A. ARE THE CHALLENGED RULES "STANDARDS OF GENERAL APPLICATION?"

Standard of General Application--Rules Applying to Prisoners¹⁰

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹¹

However, a different approach is taken in the case of rules applying to prisoners. California courts have long distinguished between: (1) statewide rules and (2) rules applying solely to one prison.¹² In *American Friends Service Committee v. Procnier* (1973) (hereafter, "*Procnier*"),¹³ a case which overturned a trial court order directing the *Director of the Department* to adopt *departmental* rules and regulations pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are *distinguished from the institutional rules* enacted by each warden of the particular institution affected. [Emphasis added.]"¹⁴

Procunier is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 which specifically made the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules "promulgated by the Director" (emphasis added), were subject to APA requirements.¹⁵ The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden"

OAL has consistently taken the position, based on *Procunier*, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c),¹⁶ has declared, in part, that:

"(c) The following are deemed *not* to be 'regulations' as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:

(1) *Rules* issued by the director or by the director's designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public.
[Emphasis added.]"

This statutory language confirms that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.¹⁷

The challenged rules do not apply statewide

In his request for determination, Mr. Glass specifically referred to the rules governing the inmates housed in the VCU of PBSP. He made no allegation that any of the rules were applied to inmates statewide. In his own words, the rules applied solely to one unit at PBSP.

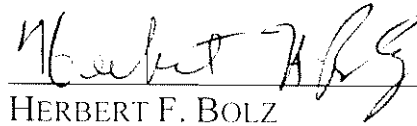
OAL, therefore, concludes, based on *Procunier*, that the rules allegedly in effect at the time the request for this determination was made, governing the inmates housed in the VCU of PBSP, were not “regulations”¹⁸ within the meaning of the APA because they were not rules or standards of *general* application; that is, they did not apply to inmates statewide. They were “local” rules applying solely to one particular prison.

Since the challenged rules did not meet the first part of the two-part test, it is not necessary to address the second part of the test.

CONCLUSION

For the reasons set forth above, OAL finds that the Pelican Bay State Prison rules governing inmates housed in the violence control unit were not "regulations" within the meaning of the APA, and thus did not violate Government Code section 11340.5.

DATE: September 21, 1998



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ENDNOTES

1. This Request for Determination was filed by Mark Anthony Glass, C-38781, P.O. Box 7500, C-1-121, Crescent City, CA 95532. The agency's response was submitted by Pamela L. Smith-Steward, Deputy Director of the Legal Affairs Division, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 485-0495.

2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. A copy of this request for determination was served by mail on both the warden of Pelican Bay State Prison and the Director of the Department of Corrections ("CDC"). When the Office of Administrative Law accepted the request for determination, the Notice of Acceptance was mailed on July 8, 1991, not only to Mr. Glass, but also to the Director of CDC, the Deputy Director of Legal Affairs of CDC, the Acting Chief of the Regulations and Policy Management Unit of CDC, and a Staff Counsel of CDC.
4. Request for Determination, pp. 3-6.

The rules set forth by Mr. Glass covered a wide variety of subjects. They referred to the number of library books allowed, the number of sets of clothing provided, rules regarding escorts, the unavailability of cotton blankets, etc.

5. **1991 OAL Determination No. 4**, p.85 (Department of Corrections, April 1, 1991, Docket No. 90-006), CRNR 91, No. 27-Z, July 5, 1991, p. 910, concluded that subsequent laws or actions (e.g., rescission of the policy) by the agency do not alter the obligation of OAL under its own regulations (Title 1, CCR, sections 123 & 126) to issue a determination based upon the law and facts at the time the request was filed.

As any other state agency, OAL is bound to follow its own regulations. See *Memorial, Inc. v. Harris* (9th Cir.1980) 655 F.2d 905, 910, n.14.

6. The APA would apply to the Department's rulemaking even if Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
7. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

8. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published after *Grier*, in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

9. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
10. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of

Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.

11. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
12. See *In re Allison* (1967) 66 Cal.2d 282, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); *In re Harrell* (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); *In re Boag* (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also *Department of Corrections*, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections *and* of the particular institution. . . .") (Emphasis added.)
13. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
14. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
15. The dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132, 1135. The *Hillery* court, though forcefully rejecting arguments that a particular chapter of the Department of Corrections' statewide Administrative Manual did not violate the APA, carefully noted:

"This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to *devise particular rules* applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions are exempted from certain provisions of the guidelines involved here, the guidelines at issue (1) were adopted by the Director of the Department of Corrections and (2) are of *general* applicability." (Emphasis added.) (720 F.2d at 1135, n. 2.)
16. Penal Code section 5058, subdivision (c), codified case law regarding the local rule exception.
17. The agency response declares under penalty of perjury that the VCU has not existed since 1993. Penal Code section 5058, subdivision (c), was not enacted until *January 1, 1995*, therefore, the conditions it sets forth are not applicable in this determination.

18. The inmates of PBSP had another avenue to pursue their concerns regarding the rules governing the VCU.

Title 15, CCR, sections 3084.1-3085, specify the process by which “any inmate . . . may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare” through four levels of review within the Department of Corrections.